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Supreme Court, U.S.
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(2)

NO. 89-247

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

THE STATE OF COLORADO,

Petitioner

v.

JOHN WESLEY LACY

Respondent

On Writ of Certiorari to

the Supreme Court of Colorado

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DAVID F. VELA
Colorado State Public Defender

JUDY FRIED
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32 pp

QUESTION PRESENTED FOR REVIEW

Should this Court review the correctness of the decision of the Colorado Supreme Court invalidating, for purposes of enhancement of sentence, two guilty pleas in which the court, in accepting the pleas, failed to inform Mr. Lacy of the nature of the charges to which he was pleading guilty.

NO. 89-247

IN THE SUPREME COURT OF THE UNITED STATES

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THE STATE OF COLORADO,

Petitioner

v.

JOHN WESLEY LACY

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner (who was the Respondent in the State Supreme Court below) will be referred to as the State or as the prosecution. Respondent (who was the Petitioner in the State Supreme Court) will be referred to by name.

STATEMENT OF THE FACTS

I. Proceedings Below

John Lacy was charged in Jefferson County, Colorado, with the offense of attempted kidnapping[1] and third degree assault.[2] The charging document was amended to add four counts of prior felony convictions, pursuant to the Colorado Habitual Criminal Offender Act.[3] Upon Mr. Lacy's motion and a hearing on the validity of the previous convictions, the trial court dismissed one of Mr. Lacy's prior convictions. The remaining three felonies consisted of operating an automobile without the owner's

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1. Secs. 18-3-302 and 18-2-101, 8B Colo. Rev. Stat. (1986). Under these sections the kidnapping offense with which Mr. Lacy was charged is a class 5 felony, the least serious felony in Colorado. Sec. 18-1-105, supra.

2. Sec. 18-3-404, 8B Colo. Rev. Stat. (1986). As charged in this case, third degree assault is a class 1 misdemeanor.

3. . Sec. 16-13-101, 8A Colo. Rev. Stat. (1986).

consent (commonly known as "joyriding");[4] theft, and second degree assault. Mr. Lacy was found guilty by the jury of the kidnapping and assault charges, and was also found previously to have been convicted of the three felonies. In the alternative to the mandated sentence of life imprisonment pursuant to the habitual criminal statute, the trial court imposed a sentence of four years on the kidnapping conviction in the event the habitual criminal sentence was declared invalid on appeal. The prosecution expressed no opposition to the alternative sentence.

The Colorado Court of Appeals affirmed Mr. Lacy's convictions and sentences.[5] The Colorado Supreme Court granted certiorari, and, held[6] that two of the convictions--a 1976 Ohio theft conviction and a 1980 Washington assault conviction--upon which the habitual criminal findings were predicated were invalid.[7] Unanimously holding the Ohio conviction to be unconstitutionally obtained, the Supreme Court invalidated the Washington conviction by a four to three majority.

ARGUMENT

I. THE COLORADO SUPREME COURT CORRECTLY APPLIED PRECEDENTS OF THIS COURT AND ITS DECISION THAT THE GUILTY PLEAS WERE INVALID NEED NOT BE REVIEWED BY THIS COURT.

A. THE 1976 OHIO GUILTY PLEA TO THEFT.

Mr. Lacy was incarcerated at the time he entered his plea to theft. In return for his plea of guilty he was placed on probation; he received no other concessions for his plea.[8] The

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4. Joyriding is not a felony in Colorado. See Sec. 18-4-409(4), 8B Colo. Rev. Stat. (1986).

5. People v. Lacy, No. 85 CA 1264 (Colo. App. May 14, 1987) (Not Selected for Publication).

6. Lacy v. People, 775 P.2d 1 (Colo. 1989).

7. Because a minimum of two convictions are necessary in order to enhance a sentence under the Colorado habitual criminal statute, the court declined to address the validity of the remaining conviction. If that conviction were invalid, a determination by this Court that only one of the convictions found invalid by the Colorado Supreme Court was in fact valid, would not affect Mr. Lacy's sentence.

transcript of the providency hearing further reveals that although defense counsel had agreed to the plea agreement on behalf of Mr. Lacy, counsel's main role at the plea hearing was to "bring to the court's attention" the presence of the victim, Elbee Billup, who stated:

> As long as [Lacy] agreed to pay the damage to my car, naturally, I don't want to press charges against him, because I have let him have the car. He used the car without my consent before, but not this particular time. So I won't press charges against him, if it please the Court.[9]

Ohio Tr. at 4.

After the prosecutor had read the charge as contained in the indictment, the trial court then engaged in the following exchange with Mr. Lacy:

> [THE COURT]: All right, Mr. Lacy, the charge here is a felony of the fourth degree; it's the less serious of all of our felonies. However, it is still a serious charge. And the charge is, as [the prosecuting attorney] has stated, that you very, very briefly took Mr. Billup's car without his consent on the 7th of November?
> [MR. LACY]: Right.

Ohio Tr. at 4.

In neither this advisement, nor in the prosecutor's reading of the charge was Mr. Lacy ever informed of the specific intent element of the offense to which he pleaded guilty.

Basing its decision solely on the Colorado law, the Colorado Supreme Court held unanimously that "[u]nder these circumstances, it is evident that Lacy was not given an explanation and did not evince an understanding of the true nature of the charge to which he pled guilty." Lacy v. People, 775 P.2d at 9.

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8. Transcript of providency hearing in the Court of Common Pleas, Mahoning County, Ohio at 2-3 [hereinafter Ohio Tr.]. This transcript is designated "Appendix A."

9. The prosecution characterizes this statement as "ambiguous," Pet. for Cert. at 8, n.4, and hypothesizes that if Billup's statement were true, "trial would have been a simple matter." Id. While trial might have been a simple matter, awaiting a trial in jail might not have been. Thus, motives other than guilty might have persuaded Mr. Lacy to accept the plea agreement. Cf. North Carolina v. Alford, 379 U.S. 952 (1970). The Ohio prosecutor did not dispute Billup's statement. Ohio Tr. at 4.

A. THE 1980 WASHINGTON PLEA TO SECOND DEGREE ASSAULT.

In Spokane County, Washington, Mr. Lacy was charged with the offense of second degree assault. (Transcript of providency hearing in Superior Court of Spokane County, Washington at 2 [hereinafter Wash. Tr.].[10] According to the district attorney, Mr. Lacy was present with his attorney and they had been given a copy of the information. Wash. Tr. at 2. Defense counsel stated that he and the district attorney had agreed to waive the preliminary hearing, the filing of a sexual psychopathy petition, and a ten-day notice requirement for filing the petition. Wash. Tr. at 2-3. In response to questioning by the court, Mr. Lacy stated that he had "talked to [his attorney] about this" and that he understood the charge. Wash. Tr. at 3. The court told Mr. Lacy that he was accused of the crime of second degree assault and that the maximum sentence was ten years. Wash. Tr. at 3. The court then informed Mr. Lacy of the rights which would be waived by a plea of guilty. Wash. Tr. at 3-4. Upon then being asked, "How do you plead to the crime of Second Degree Assault as charged," Mr. Lacy responded, "Guilty." Wash Tr. at 4. After explaining the possible penalties for the offense of second degree assault, the court stated, "You were asked to state in your own words what you did that caused this charge to be filed, and I find here: 'I choked Annette Nuns.'" Wash. Tr. at 5. The district attorney then read a factual statement upon which the charge was based. Wash. Tr. at 6. Finally, the court explained the procedure involved with the sexual psychopath petition and proceedings were adjourned. Wash. Tr. at 8-9.

Although the charge stated that the offense of second degree assault contained the element of intent to commit second degree rape, at no time during the plea hearing was Mr. Lacy told this, either by the court, his attorney or the prosecuting attorney. After noting that "[t]he record contains no showing that the court made even a general effort to explain the mental states

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10. This transcript is designated "Appendix B."

critical to the offense of second degree assault or to describe in any way the elements of the crime of second degree rape," the Colorado Supreme Court concluded that the plea was invalid for sentence enhancement purposes because the "defendant has made a prima facie showing that he lacked an understanding of the nature and elements of the crime of second degree assault" and "[t]he prosecution produced no evidence to carry its burden to show that the conviction was constitutionally obtained." Lacy v. People, 775 P.2d at 8.[11]

C. LEGAL BASIS FOR COLORADO SUPREME COURT'S DECISION

In order for a plea of guilty to be valid for sentence enhancement purposes in Colorado, the defendant must receive "'"real notice of the true nature of the charge against him."'" Lacy v. People, 775 P.2d at 4 (quoting Henderson v. Morgan, 426 U.S. 637, 645 (1976)) (quoting Smith v. O'Grady, 312 U.S. 329, 336 (1941)). In Lacy the Colorado Supreme Court noted that under Colorado decisional law "the record must affirmatively demonstrate the defendant's understanding of the critical elements of the crime to which the plea is tendered." Id., 775 P.2d at 5. Acknowledging this Court's statements in Morgan and in Marshall v. Lonberger, 459 U.S. 422 (1983) that in some circumstances it may be presumed that a defendant has been adequately informed by his lawyers or otherwise of the charges to which he is pleading guilty, the court then stated: "However, a showing that defense counsel gave some explanation to his client of the charge to which the guilty plea is tendered does not by itself sufficiently demonstrate that the defendant knew the critical elements of the crime when the plea was entered." Lacy

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11. In Colorado, a defendant, when attacking a prior conviction based on a plea of guilty, has the initial burden to make a prima facie showing of invalidity. Upon such a showing, the burden shifts to the prosecution to show facts supporting the validity of the plea. See Watkins v. People, 655 P.2d 834 (Colo. 1982). A statement by defense counsel that he advised the defendant of the nature of the charges is sufficient to satisfy the prosecution's burden of of establishing validity of a plea. People v. Lesh, 668 P.2d 1362 (Colo. 1983).

v. People, 775 P.2d at 6. It is this narrow point upon which the State has requested review by this Court. This statement by the Colorado court is not inconsistent with this Court's holdings in Morgan and Lonberger. As noted in Lacy, the Colorado Supreme Court explicitly recognizes the presumption that counsel has explained to his client the nature of the offense so that he knows the offense to which he is admitting guilt. However, in this case the court found the presumption to have been overcome by facts appearing in the plea hearings.

In the Ohio plea the absence of an advisement of any of the elements of the offense together with the statement of the complaining witness tending to indicate that Mr. Lacy did not have the requisite intent to render him guilty of the charged offensse, apparently was considered sufficient to overcome the presumption that Mr. Lacy had been informed of the critical elements of the charge by his attorney or otherwise. And in the Washington plea the failure of the court to inform Mr. Lacy of any of the elements of the offense and the fact that the offense included a specific intent to commit another crime, the elements of which also were unexplained, were apparently sufficient to rebut the presumption that Mr. Lacy had been informed of these elements by his attorney.

In reviewing the constitutional validity of guilty pleas, the Colorado Supreme Court has routinely refused to hold the trial court to a formalistic litany in advising a defendant of the nature of the charges. People v. Leonard, 673 P.2d 37 (Colo. 1983). The Colorado court has followed McCarthy v. United States, 394 U.S. 459, 465 (1965), holding that a lack of factual basis alone for a plea alone is not a due process violation. Lacy, 775 P.2d at 5. Likewise the Colorado Supreme Court has rejected assertions that the absence of any reference to the prosecution's burden of proof in criminal trials invalidates the guilty plea. People v. Wade, 708 P.2d 1366, 1370 (Colo. 1985). Even in cases where the three constitutional rights enumerated in

Boykin were absent from an advisement, the plea was not necessarily invalid. Id, 708 P.2d at 1369. Rather, the record as a whole must simply show that the defendant entered his guilty plea voluntarily and understandingly. Id., 708 P.2d 1368-69.

In the ten guilty plea cases reviewed in the past five years, by the Colorado Supreme Court under the principles announced in Henderson v. Morgan, the guilty pleas were upheld in seven. In City of Colorado Springs v. Forance, 776 P.2d 1107 (Colo. 1989), a post-Lacy decison, a cursory advisement on a traffic summons and complaint was sufficient to give notice of the statutory elements of the offense); in People v. Trujillo, 731 P.2d 649 (Colo. 1986), the reading of the information was sufficient to advise the defendant of the nature of the offense; in People v. Chavez, 730 P.2d 321 (Colo. 1986), the record was sufficient to show defendant's understanding of the penalty); and in People v. Hrapski, 718 P.2d 1050 (Colo. 1986), the court held that in determining whether a guilty plea is made knowingly and voluntarily no formal ritual need be followed by the trial court; and in Wilson v. People, 708 P.2d 792 (Colo. 1985), the term feloniously appearing in the information sufficiently informed the defendant of the requisite mens rea and hence defendant was adequately advised; in People v. Cabral, 698 P.2d 234 (Colo. 1985), the defendant's guilty plea to first degree assault was properly received where the reading of the information provided a sufficient record to demonstrate that the defendant understood the nature of the offense; in Ramirez v. People, 682 P.2d 1181 (Colo. 1984),the record sufficiently demonstrated that the defendant understood nature of crime of attempted possession.

D. THERE ARE NOT SUFFICIENT REASONS FOR GRANTING A WRIT OF CERTIORARI.

In its Petition the State asserts that the Colorado court's decision in Lacy will undermine several important advantages of the use of guilty pleas. The State asserts that "[u]nder Lacy,

it is more important for judges to say certain words during advisements that to ascertain whether defendant's actually under stand what they are facing." Pet. for Writ of Cert. at 13. As pointed out above, the Colorado court has eschewed the requirement of a formalistic litany in advising pleading defendants of the nature of the charges to which they are pleading. See Wade, 708 P.2d. at 1368.

The State also decries the effect of Lacy in overturning guilty pleas "years after a plea is made." Pet. for Cert. at 13. Lacy certainly will not have this effect in Colorado. Under section 16-5-402, 8A Colo. Rev. Stat. (1986), except in limited circumstances, a guilty plea in a non-capital felony must be collaterally attacked within three years following conviction. See People v. Fagerholm, 768 P.2d 689 (Colo. 1989).

Finally, the State asserts that "Lacy erodes the respect which is normally accorded the judgments of sister states and makes conflict between the states more likely." Pet. for Cert. at 15. However, the State overestimates the effect of the ruling in Lacy. The ruling of a Colorado court on the validity of a conviction in another state has no effect on that state's judiciary. Moreover, under Colorado decisional law a ruling on a collateral attack on a plea of guilty sought to be used for enhancement purposes constitutes only an evidentiary ruling and is not subject to the operation of the doctrine of collateral estoppel. Wright v. People, 690 P.2d 1257 (Colo. 1984). Thus, under Colorado law, a ruling in a particular case excluding the use of a prior conviction for sentence enhancement purposes on the ground of the invalidity of a guilty plea is not binding on any other court in a different proceeding.

CONCLUSION

It is respectfully submitted that the decision of the Colorado Supreme Court in this case is substantially correct and substantially in accordance with principles established by decisions of this Court. Accordingly, there is no need for further review of the Colorado Supreme Court's decision by this Court.

DAVID F. VELA
Colorado State Public Defender

JUDY FRIED
Deputy State Public Defender

THOMAS M. VAN CLEAVE, III
Deputy State Public Defender
(A Member of the Bar of this Court)

ATTORNEYS FOR RESPONDENT
110 Sixteenth Street, Suite 800
Denver, Colorado 80202
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CERTIFICATE OF SERVICE

I, Thomas M. Van Cleave III, a member of the Bar of the Supreme Court of the United States and counsel of record for John Wesley Lacy, Respondent herein, certify that on October 5, 1989, I served one copy of the attached Brief in Opposition to the Petition for Writ of Certiorari, on the Honorable John D. Dailey, Deputy Attorney General, for the State of Colorado, counsel for Petitioner, by hand-delivery to the address as follows:

John D. Dailey
Deputy Attorney General
1525 Sherman Street
Third Floor
Denver, Colorado 80203

John Milton Hutchins
First Assistant Attorney General
1525 Sherman Street
Third Floor
Denver, Colorado 80203

Thomas M Van Cleave III

CERTIFICATE OF MAILING

I, Thomas M. Van Cleave, III, a member of the Bar of the Supreme Court of the United States and counsel of record for John Wesley Lacy, Respondent herein, certify that on October 5, 1989, I deposited in the United States Mails, postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, the foregoing Brief in Opposition to Petition for Writ of Certiorari and Motion to Proceed in Forma Pauperis Without an Affidavit of Indigency.

Thomas M Van Cleave III

APPENDIX A

STATE OF OHIO)
) SS.
MAHONING COUNTY)

IN THE COURT OF COMMON PLEAS

CASE NO. 75-CR-759

STATE OF OHIO

Plaintiff

-vs-

JOHN LACY

Defendant

TRANSCRIPT OF PROCEEDINGS

GUILTY PLEA

APPEARANCES:

On behalf of the State of Ohio:
Thomas Zena, Asst. Prosecutor
Court House, 3rd Floor
Youngstown, Ohio

On behalf of the Defendant:
John Breckenridge, Esq.
402 Legal Arts Centre
Youngstown, Ohio

BE IT REMEMBERED that at the trial of the above-entitled cause, in the Court of Common Pleas, Mahoning County, Ohio, beginning on the 11th day of February, 1976, and continuing thereafter, as hereinafter noted, before the HONORABLE CLYDE W. OSBORNE, the above appearances having been made, the following proceedings were had:

DEFENDANT'S EXHIBIT 3 E-17-85

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P R O C E E D I N G S

MR. ZENA: May it please the Court, your honor, we're here today on Case No. 75-CR-759, State of Ohio versus John Lacy. Your honor, Mr. Lacy has been indicted by the Mahoning County Grand Jury, the September Term of the Grand Jury stating that on or about November 7, 1975, with purpose to deprive the owner, Elbee Billup, 1090 Griffith Street, Apartment 467, Youngstown, Ohio, of a 1964 Pontiac Catalina, bearing Ohio Registration No. J-387-K, knowingly obtained or exerted control over said property without the consent of Elbee Billup, or a person authorized to give consent, the value of said property being more than $150.00, in violation of 2913.02 (A)(1).

Your honor, this defendant is in court represented by Attorney Breckenridge and that the prosecution, State of Ohio, is represented by Attorney Tom Zena. I have gone through extensive negotiations with Mr. Breckenridge. Also, your honor, another charge against Mr. Lacy--and I'll tell this to the defendant--has been no billed by the Grand Jury through the efforts of his counsel. As part of the plea negotiations, your honor, Mr. Breckenridge informed me that this defendant would plead as charged, a felony of the fourth degree, carrying a possible punishment of six months, one,

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one and one-half to two to five years. At the recommendation of the State of Ohio, after such plea is accepted, we would make a recommendation for probation, which the prosecuting staff would not be opposed, nor would the recommendation of probation be opposed.

MR. BRECKENRIDGE: Your honor, if it please the court, I would also like to bring to the Court's attention that Mr. Elbee Billup, the man who owned the particular car, is here in court. And I think it would help the Court and also the probation office in later proceedings if the Court would interrogate Mr. Billup and take a statement. I think he's already talked to Mr. Zena.

MR. ZENA: Your honor, for the purposes of the record, I'll concur and stipulate for the purpose of the record that Mr. Billup has personally come into my office and told me about various efforts of the defendant to make restitution in this matter. Further, Mr. Billup requested of me on numerous occasions that this charge be dismissed against this defendant and personally requested as a favor that it be done because of Mr. Lacy's efforts at restitution and Mr. Lacy's very strong cooperation with Mr. Billup.

THE COURT: Is there anything that you would

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like to say in addition to that?

MR. BILLUP: No, I have nothing to say.

THE COURT: Is this a fair summary of what the transaction has been?

MR. BILLUP: As long as he agreed to pay the damage to my car, naturally, I don't want to press charges against him, because I have let him have the car. He used the car without my consent before, but not this particular time. So, I won't press charges against him, if it please the Court.

THE COURT: Thank you.

BY THE COURT:

Q All right, Mr. Lacy, the charge here is a felony of the fourth degree; it's the less serious of all of our felonies. However, it is still a serious charge. And the charge is, as Mr. Zena has stated, that you very, very briefly took Mr. Billup's car without his consent on the 7th of November?

A Right.

Q And, of course, if you did that, then you are guilty of this crime. By pleading guilty to it, you put yourself in a position where you are subject to a sentence of imprisonment of not less than six months, nor more than

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five years. Now this can be six months, one year, one and one-half years up to two years and a maximum of five years, do you understand that?

A Yes.

Q Do you understand that by pleading guilty you put yourself in a position where I can immediately impose sentence upon you. I'm not going to do that, because I understand there is going to be a probation request, but you understand that I can?

A Yes.

Q I'm sure Mr. Breckenridge told you that you are entitled to a trial by jury. And, of course, you waive that by pleading guilty. You waive a lot of other rights that are concurrent with that; the first that you have a right to be present at all times during the trial, with your lawyer, the right to cross examine witnesses who testify against you, or at least face them while they accuse you. That is the right to confront witnesses. Then you have the right to require witnesses to come in on your behalf, if you have any, the right to compulsory process. You are presumed to be innocent of this charge, and that presumption of innocence protects you through the trial until the jury removes it or the State has proved your guilt by the degree

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of proof which is called beyond a reasonable doubt, the highest degree of proof in our law. If you go to trial, of course, you cannot be compelled to testify or take the stand, either in your own behalf or against yourself. And if you don't, the prosecuting attorney and the Court and everyone else is forbidden to make any comment on your failure to testify to your disadvantage. Do you have any questions so far?

A No, sir.

Q Now if you would go to trial, Mr. Lacy, and are convicted, then the law of Ohio and the Rules of Criminal Procedure say that you have the right to appeal the conviction to the Court of Appeals. And if you don't have the money to hire a lawyer or pay the cost of the appeal, these things will be taken care of for you. Of course, a plea of guilty would eliminate that particular provision. Do you understand everything I have said up to now?

A Yes.

Q In view of what I have told you, do you want to waive these rights and change your plea to guilty to this charge, Mr. Lacy?

A Yes.

Q Are you doing this voluntarily?

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A Yes, sir.

Q Has anyone threatened you or tried to coerce you to make you plead guilty?

A No, sir.

Q Has anybody promised you anything, other than what's been said here today, about not opposing probation and so forth?

A No, sir.

Q So I understand that you are doing this completely of your own free will?

A Yes, sir.

Q Do you have any questions at all up to now?

A No, sir.

Q Fine. Now I see that you have signed this paper and that's your signature?

A Yes.

Q And Mr. Breckenride witnessed it. I'll accept the plea of guilty and refer the application for probation to the Adult Parole Authority and continue the bond.

THE COURT: This is, of course, for Judge Bannon?

MR. ZENA: Yes. The probation report will be a minimum of 12 weeks. (Hearing concluded)

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REPORTER'S CERTIFICATE

I hereby certify that the proceedings and evidence are contained fully and accurately in the notes taken by me on the foregoing cause, and that this is a correct and complete transcript of same.

Angelo G. Abbatti

OFFICIAL COURT REPORTER

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SPOKANE

STATE OF WASHINGTON, Plaintiff, v. JOHN WESLEY LACY, JR., Defendant.	NO. 80-1-00413-2 Before the HONORABLE DONALD N. OLSON, Judge.

APPEARANCES:

For the Plaintiff: Mr. Daniel Short
Deputy Prosecuting Attorney
Public Safety Bg.
Spokane, WA. 99260

For the Defendant: Mr. Gary Hemingway
Asst. Public Defender
Spokane County Courthouse
Spokane, WA. 99260

GUILTY PLEA

PENNY A. RAUSCHKE
OFFICIAL COURT REPORTER
DEPT. NO. 5. SUPERIOR COURT
SPOKANE, WASHINGTON 99260

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MORNING SESSION
6/6/80

THE COURT: Mr. Short.

MR. SHORT: Good morning, Your Honor.

Please the Court and Counsel, this is the time set for the hearing on the case of State of Washington versus John Lacy, Jr.; cause number 80-1-00413-2. On the 28th of May, 1980, before this Court, an Information was filed charing the defendant with Second Degree Assault. At that time Mr. Lacy appeared with counsel, Gary Hemingway, and entered a plea of not guilty. Trial was scheduled for June 4th. On June 4th a decision was made not to enter the plea, Your Honor. The trial was then scheduled for the next day and based on negotiations, Mr. Lacy has made a decision now to come before the Court and enter a plea of guilty.

He is before the Court with his counsel, Gary Hemingway, the warrant has been read; they have received a copy of the Information. I might indicate also, Your Honor, that the Court does have a copy of the State's Petition alleging sexual psychopathy, and the defendant is aware of this and I believe agrees with the Petition being filed.

MR. HEMINGWAY: That's correct, Your Honor. Mr. Lacy and myself have signed a stipulation waiving preliminary hearing on it, sexual psychopathy petition, and the require-

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ment of a ten-day service of the petition ten days prior to any hearing.

MR. SHORT: I will hand this up, Your Honor.

(Mr. Short presents document to the Court).

THE COURT: Mr. Lacy, would you stand, please.

Mr. Lacy, you're 33 years old?

MR. LACY: Yes, sir.

THE COURT: Your true name is John Wesley Lacy, Jr.?

MR. LACY: Yes, sir.

THE COURT: You are appearing here with your attorney, Mr. Hemingway; you have talked to him about this; you understand this charge?

MR. LACY: Yes, sir.

THE COURT: You know that you're accused of the crime of Second Degree Assault, and that the maximum sentence for this is ten years?

MR. LACY: Yes.

THE COURT: In prison or a $10,000.00 fine or both?

MR. LACY: Yes.

THE COURT: You have a right to have a trial by jury; you have a right to have a lawyer for such a trial; if you can't afford one, one would be appointed at no expense to you; you have the right to hear and question witnesses who testify against you; the right to call witnesses to testify for you, they can be called at no expense to you; you would have the

right to testify or remain silent at the trial as you saw fit: the State would have to prove the charges beyond a reasonable doubt; and if you were convicted, you would have the right to appeal.

You understand all those rights?

MR. LACY: Yes, sir.

THE COURT: If you plead guilty, there is no trial and you waive those rights.

MR. LACY: Yes, sir.

THE COURT: How do you plead to the crime of Second Degree Assault as charged?

MR. LACY: Guilty.

THE COURT: Do you make the plea freely and voluntarily?

MR. LACY: Yes, sir.

THE COURT: No one has threatened harm of any kind to you or anybody else to cause you to make the plea?

MR. LACY: No, sir.

THE COURT: No one has made any promises, other than you understand the prosecuting attorney will file a Sexual Psychopathy Petition?

MR. LACY: Yes, sir.

THE COURT: That's the only agreement you have with the prosecutor?

MR. LACY: Yes, sir.

THE COURT: You understand that while the prosecutor may

make a recommendation to the Court for sentencing, the Court doesn't have to follow those recommendations. Should you be sentenced to prison the judge has to sentence you to the maximum term, which is ten years. The Board of Prison Terms and Paroles sets the minimum term.

You were asked to state in your own words what you did that caused this charge to be filed, and I find here:

"I choked Annette Nuns".

Is this your statement?

MR. LACY: Yeah. I spelled it wrong.

THE COURT: Oh, is it?

MR. LACY: (Examines document) Oh, M-U-S-E. Okay.

THE COURT: And is this your signature on the statement you handed up?

MR. LACY: Yes.

THE COURT: All right. You may be seated.

Mr. Short.

MR. SHORT: Very briefly, Your Honor.

The facts of the case are that during the early morning hours of March 6, 1980, Annette Muse, the victim in this case, was 20 years old and she met Mr. Lacy at Dr. Johns in Spokane County, and they were there with other friends, and these friends left and Annette had no way home. She was going to call a cab and Mr. Lacy offered her a ride home.

She met Mr. Lacy on at least one other occasion several

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months before this.

She accepted a ride home and gave Mr. Lacy directions to an apartment house just north of Ferris High School and Mr. Lacy drove her directly from downtown Spokane to the apartment house parking lot. At the parking lot she started to leave the car to go up to the apartment. Mr. Lacy asked her to wait a minute. She was then pulled back into the car and he attempted to kiss her and she struggled and it is indicated he then choked her with his hands around her neck, and she lost consciousness. When she awoke she was laying in the front seat of the car on the floor and observed that there were a number of trees around the area. She believed the car had been moved, and she saw Mr. Lacy in the driver seat of the car masturbating, and when he saw her wake up he then went from his side of the car over to her side and, again, there was a brief struggle. Threats were made that she should comply with his demands or she would be killed, and she then stopped struggling and he was able to partially remove her blouse by unzipping it, and, again, to take her pants down to her ankles. She was then taken from the car out to a wooded area. They walked from the car and there, again, more demands were made, and threats were made. She did not comply and after some period of time she was able to calm the defendant down and they walked from the wooded area back to the parking lot where she called police.

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They showed up and took a statement.

She received bruises about the neck and a bruise above her breast.

The incident in the wooded area took place very close to Ferris High School; it took place in Spokane County. There was no completion of a sexual act, Your Honor.

Also, Mr. Lacy, Your Honor, then did give a statement to detective Teigen, and indicated that he did check her but felt she was still conscious; that her pants were pulled down; that he did have occasion to place his mouth on her breasts; that he was masturbating, and it seems he feels that he had too much to drink and he got a little crazy.

That's the extent of the report.

THE COURT: Mr. Hemingway.

MR. HEMINGWAY: Yes, Your Honor.

At this time we would ask the Court to accept the guilty plea, and also Mr. Short and I discussed whether we needed a waiver of a PSI when we file a Sexual Psychopathy Petition.

THE COURT: I was going to ask you about that same question. I think that the rule is most likely to interpret it by the Supreme Court says you impose sentence and then suspend it if you want to send them out on a sexual observation, and, of course, if you impose sentence, even if you're going to suspend it, ordinarily you would have a pre-sentence. I thought I just might sign an order dispensing with it and if

we get back to imposing the sentence - I mean if the hospital doesn't examine him, I see no reason why you couldn't order a pre-sentence report at that time.

MR. HEMINGWAY: Then possibly I can prepare on.

THE COURT: Okay. All right. I have one; okay. No, that's all right. If you will just have him sign it there, Gary.

Mr. Lacy, would you stand again? (Defendant complies with request).

Mr. Lacy, you further understand part of the agreement before you made your plea, and what Counsel just indicated, that the prosecuting attorney has filed a Petition alleging that you may be a sexual psychopath, and ask that you be sent out to Eastern State Hospital for 90-days observation. Do you understand that?

MR. LACY: Yes, sir.

THE COURT: All right.

Now, based on your plea of guilty to the crime of Second Degree Assault, it is the finding and judgment of the Court that you are guilty. Do you know any reason why sentencing shouldn't be pronounced now?

MR. LACY: No, sir.

THE COURT: Do you have anything you would like to say, Mr. Lacy?

MR. LACY: No, sir.

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THE COURT: Mr. Lacy, I would point out that the procedure which has been specified is that the Court impose sentence first and then suspend the sentence. Or suspend the execution of that sentence while the Sexual Psychopathy examination, or period, is while you're out at the Hospital. So it would be the judgment of the Court that you be committed to the Division of Institutions for a period not to exceed ten years. That would be suspended and, I guess, I need to specify a period of time there. So I would say five years, and this would be on the condition that you be referred to Eastern State Hospital for observation and determination under the sexual psychopath statutes, and if found to be a sexual psychopath, that you further comply with the treatment and courses that are recommended by the Hospital.

Okay. You may be seated.

I am signing the Judgment and Sentence and the Committment for 90-days observation in the presence of the defendant.

(WHEREUPON COURT ADJOURNED).

DISCOVERED Guilty Plea
MAY 28 1975

STATE OF COLORADO

OFFICE OF THE PUBLIC DEFENDER

DAVID F. VELA
State Public Defender

APPELLATE
110 16th Street
8th Floor
DENVER CO. 80202
(303) 620-4888

October 5, 1989

Office of the Clerk
Supreme Court of the United States
Washington D.C., 20543

Dear Clerk of the Court:

Enclosed is the Brief in Opposition in the case State v. Lacy, No. 89-247. As discussed over the telephone with Mr. Lorenz, the brief is a few days late. The additional time was necessary to secure the appendixed documents.

Thank you for your courtesy.

Sincerely,

Judy Fried

Judy Fried
Deputy State Public Defender

JF/pa

cc: Robert M. Hutchins, First Assistant Attorney General
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APPEARANCE FORM

SUPREME COURT OF THE UNITED STATES

No. 89-247

State of Colorado (Petitioner or Appellant) *vs.* John Wesley Lacy (Respondent or Appellee)

The Clerk will enter my appearance as Counsel of Record for John Wesley Lacy

(Please list names of all parties represented)

who IN THIS COURT is ☐ Petitioner(s) ☒ Respondent(s) ☐ Amicus Curiae ☐ Appellant(s) ☐ Appellee(s)

I certify that I am a member of the Bar of the Supreme Court of the United States:

Signature Thomas M Van Cleave III

(Type or print) Name Thomas M. Van Cleave III

☒ Mr. ☐ Ms. ☐ Mrs. ☐ Miss

Firm State Public Defender's Office-Appellate Division

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Phone (303) 620-4088

ONLY COUNSEL OF RECORD SHALL ENTER AN APPEARANCE. THAT ATTORNEY WILL BE THE ONLY ONE NOTIFIED OF THE COURT'S ACTION IN THIS CASE. OTHER ATTORNEYS WHO DESIRE NOTIFICATION SHOULD MAKE APPROPRIATE ARRANGEMENTS WITH COUNSEL OF RECORD.

ONLY ATTORNEYS WHO ARE MEMBERS OF THE BAR OF THE SUPREME COURT OF THE UNITED STATES MAY FILE AN APPEARANCE FORM.

IT IS IMPORTANT THAT ALL REQUESTED INFORMATION BE PROVIDED.

CO-73A